IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 198

RICHARD M. SMITH,

Petitioner

v.

FRED M. HOOEY, JUDGE,
AND CAROL S. VANCE, DISTRICT ATTORNEY,

Respondents

On Petition for Writ of Certiorari
to the Supreme Court of Texas

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW

Petitioner's statement is correct.

JURISDICTION

Petitioner's statement is correct, but respondents submit that the record herein is wholly insufficient for this court adequately to exercise its jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner's statement is correct.

QUESTIONS PRESENTED.

Petitioner's statement is correct, to which respondents add the following questions:

1) If a financially able federal prisoner desires a speedy trial on criminal charges pending against him in a state court, does the law impose upon him the obligation to request federal authorities to transport and deliver him to the state court for trial at his own expense?

2) If a financially able federal prisoner later claims he has become "indigent" and undertakes to proceed in *forma pauperis*, in what forum (Federal or State, with either trial or appellate jurisdiction) does the state contest his factual claim of "indigency" in order to show that in truth his claim is false.

3) What notice, if any, to the state authorities must be given by a federal prisoner that he claims he is "indigent" before the state authorities must act on his claim, either by contesting its factual truth, or by admitting the truth thereof and proceeding to treat him as an "indigent?"

4) Does the failure of the federal prisoner (defendant) to notify the state authorities of his claim of "indigency" until some seven years after his federal incarceration constitute "adequate excuse" for the state's failure to proceed with him as an "indigent?"

5) Is the record before this court adequate upon which to determine the constitution claims now asserted by petitioner?

STATEMENT OF THE CASE

Petitioner's statement of the case is correct with the following modifications and additions:

1) The state denies that she had any notice that the petitioner is or was claiming to be "indigent" until

shortly after August 7, 1967, when respondents received a copy of the petition for certiorari herein. On the other hand the state believes that his claim of "indigency" is false, and can be successfully contested if the state is afforded a forum within which to do so.

2) Petitioner's motion for speedy trial was not "ignored by the court and prosecutor" (p. 5, Petitioner's Brief). Petitioner was immediately notified by letter in reply thereto that he would be afforded a trial within two weeks of any date he could specify at which he could be present. (p. 30, Petitioner's Brief.)

3) No disposition has been made of petitioner's trial court motion to dismiss, and cannot be made until petitioner is present for hearing on said motion as required by state law, if not in fact by the Constitution of The United States as well.[1]

4) Respondents agree with petitioner that the record herein is "not extensive" (p. 4, Petitioner's Brief); but disagrees with him "that it is sufficient for decision" herein. (p. 4, Petitioner's Brief.)

SUMMARY OF THE ARGUMENT

1) The petitioner himself must present himself at his own expense for speedy trial available to him within two weeks of any date he can be present.

2) If petitioner cannot present himself for trial at his own expense because he is or has become "indigent," he must notify the state of his claim of "indigency;" and until the state receives such notice the

[1] *Webb v. State*, 161 Tex. Cr. R. 442; 278 SW 2d 158, 159. Amendment VI, Constitution of the United States "In all criminal prosecutions, the accused shall * * * be confronted with the witnesses against him, * * *."

state is under no obligation to proceed with him in *forma pauperis* as an "indigent."

3) The state does not have any "option whether to try the defendant immediately or to await completion" of his federal sentence. (p. 7, Petitioner's Brief.) That "option" lies with the federal authorities.

4) The state has not placed a "detainer" against petitioner (p. 6, Petitioner's Brief), and does not desire that he be "detained;" but on the other hand by sheriff's letter dated as early as May 5, 1960 to the federal authorities asked for the "minimum *release* date"—not that petitioner be "detained."

5) The record before this court relevant to the constitutional claims now asserted is insufficient to permit decision of those claims, because no judicial determination can be made in advance whether a trial in state court would (as argued by Petitioner):

a) be "seriously prejudicial to" petitioner,

b) be difficult for petioner "to defend,"

c) defeat the possibility of "concurrent sentences,"

e) make chances for "parole diminish,"

f) restrict his "privileges" in prison,

g) "hurt the state by weakening its case," or

h) make the "rehabilitation process extremely difficult," (pp. 6 to 8, Petitioner's Brief).

6) The state trial court, with appellate procedures and almost automatic review by federal courts, is the only appropriate forum within which to develop and adjudicate petitioner's factual claims of unconstitutional denial of right to "speedy trial."

ARGUMENT

I

Petitioner Should Pay His Own Way If Financially Able

The Solicitor General informs us that "at the request of the prisoner or upon his inquiry, the Bureau of Prisons" will make the prisoner available for state court trial, but that in this case petitioner "did not request" that this be done. (p. 33, Petitioner's Brief.) The state's indictment against the petitioner indicates that at about the time of his imprisonment by the federal authorities he had just come into possession of $42,000.00 (p. 29, Petitioner's Brief), for which reason the state could not assume that the petitioner was anything but financially able to pay his own expenses to Texas for trial, especially since (so says the Solicitor General) "at his request" the federal authorities "encourage the expeditious disposition of prosecutions in state courts against federal prisoners" (p. 32, Petitioner's Brief). After receiving notice by letter in March, 1961, that he would be afforded a trial within two weeks of any date he could be present, the petitioner evidently decided his best interests did not require "expeditious disposition" of his state case. If petitioner had been at large desiring a trial, all he had to do was present himself for trial. In the case at bar for all practical purposes he was at large and could, "at his request" and with the benevolent attitude of the federal authorities, have presented himself for trial. He should not now be rewarded for failure to exercise his right obviously available to him. He has waived his right by failure to assert it.

"The constitutional right to a speedy trial is personal and may be waived by failure to assert it. * * * Just what constitutes waiver of the right is a question of fact to be determined in each case." *Fouts v. United States*, 253 F. 2d 215 (6th Cir. 1958); *Daneiger v. United States*, 161 F. 2d 299 (9th Cir. 1949) Cert. Den. 332 U. S. 769; 68 S. Ct. 81; 92 L. Ed. 2d 354.

II

If He Is "Indigent," Prisoner Must So Notify The State

The first notice the state had that petitioner was claiming to be "indigent" and wanted to proceed in *forma pauperis* was contained in the affidavit to his motion to proceed herein in *forma pauperis* on his petition for certiorari herein, a copy of which was received by respondents about the time it was filed in this court on August 10, 1967 (p. 5, Petitioner's Brief). Prior to that time respondents had not received any notice of the proceedings in the Supreme Court of Texas or "Criminal Court of Appeals" of Texas (p. 29, Petitioner's Brief). Nevertheless, according to the copy of his petition for mandamus in the Supreme Court of Texas (Appendix, pp. 2 to 4), which copy was first seen by respondents after the petition for certiorari herein had been filed as aforesaid, the petitioner did not file an affidavit that his claimed indigency had existed ever since his federal incarceration, even though it does go into some detail about the facts. He studiously and carefully swears only that "at this time" (June 21, 1967, date of affidavit) he is indigent. This executed affidavit is not contained (as it should be) in the printed appendix herein following Page 4

of the Appendix, but is believed to be on file with the clerk of this court, and if not on file, then we believe counsel for petitioner will stipulate the foregoing facts.

Texas law provides that a person unable to give security for costs may proceed in *forma pauperis* by filing affidavit of his inability,[1] the truth of which may be contested,[2] in which event the burden is on the affiant to prove the inability.[3] If the affidavit is false a prosecution for perjury could result.[4] In this case the petitioner carefully avoided making such affidavit until some seven or eight years after the alleged offense had been committed and the indictment returned against him. At last when he did file the affidavit it specifically limited its effect to his inability "at this time," which is deemed significant. He, being somewhat knowledgable about such matters, must have known that the State could successfully contest such affidavit and possibly convict him of perjury if he failed to bear his burden of proving what became of the alleged $42,000.00 in cash.

His studied delay in asserting his claim of indigency must be considered as factors bearing on his "waiver" of his right to a speedy trial.

> "Just what constitutes waiver of the right is a question of fact to be determined in each case." *Fouts* and *Danziger*, supra.

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[1]Rule 145, Texas Rules of Civil Procedure (quoted at p. 18 of this Brief).

[2]Article 302, Penal Code of Texas of 1925 as amended (quoted in full at p. 17 of this Brief).

[3]Article 13.01 Code of Criminal Procedure of Texas of 1965 (quoted at p. 17 of this Brief).

[4]Article 13.04 Code of Criminal Procedure of Texas of 1965 (quoted at p. 17 of this Brief).

III

State Has No Option When To Try Federal Prisoner

Petitioner contends that "the state has an option whether to try defendant immediately or await completion of his other sentence" (p. 7, Petitioner's Brief). The Solicitor General apparently does not agree, for his memorandum (pp. 32 and 33, Petitioner's Brief) informs us that the federal authorities "almost invariably" have delivered the prisoner for trial; that removals are "normally made by United States marshals;" that in "some instances" a prisoner is removed to a correctional institution within the requesting state; that "occasionally" the federal authorities will urge disposition of a federal prisoner pending state charge; that the federal authorities "doubtless" would have made the prisoner available on certain conditions; and that the "normal procedure" is a writ of habeas corpus *ad prosequendum* (prescribed not by federal or Texas law, but by the Bureau of Prisons).

Congress likewise does not agree that the state has any such option, because the applicable statute (18 U.S.C. 4085) orders the Attorney General to transfer the prisoner to an institution within the requesting state only *"if he finds it in the public interest to do so."* So any option of the state would be effective only "almost invariably," "normally," "in some instances," "occasionally," and if found "in the public interest" by the Attorney General. In short, the option exists with the federal authorities, not the state.

IV

State Did Not Place "Detainer" Against Petitioner

Without insisting on any definition of the word "de-

tainer" as used throughout the record and briefs herein, the facts are that the state has never asked or desired that the petitioner be "detained" by the federal authorities; but only that the state (sheriff) be informed of the "minimum *release* date" on which a warrant of arrest pursuant to a felony indictment could be executed on the petitioner (p. 30, Petitioner's Brief). If the federal authorities elect to "release" petitioner at some future date instead of immediately, the "detention" is not the act of the state. The Congress has provided that the federal jurisdiction under which this petitioner is held in custody shall not "take away or impair the jurisdiction of the courts of the several states under the laws thereof." (18 U.S.C. 3231.) To grant the relief prayed for by petitioner would be to "take away" the jurisdiction of the respondent court, not because of anything the state has done or failed to do, but because the federal authorities do not "release" petitioner to the state authorities for trial. Petitioner's cause of action for "speedy trial" should have been brought against his custodians —the federal authorities—not the state authorities who have absolutely no power to try him, "speedy" or otherwise, without the consent of his federal custodians.

V

The Insufficiency Of The Record Herein

Though the record herein demonstrates that counsel for all parties have undertaken to stipulate such facts as are known to them to have any bearing on the case at bar, they obviously do not know and are unable to stipulate to any specific facts which might be developed now at a trial of petitioner in the state court to solve

the question of whether such trial would result in a denial to petitioner of his constitutional right to a "speedy trial." With commendable candor, petitioner (through his able appointed counsel) says one result could be to "hurt the state, by weakening its case," (p. 7, Petitioner's Brief) which could hardly be said to deny to petitioner any constitutional right. Nevertheless, petitioner argues in effect that such right would be denied petitioner for various factual reasons agreed by "experienced penal authorities and responsible professional groups" (p. 7, Petitioner's Brief) to exist generally throughout the nation. But counsel cannot know which, if any, of these generally known facts would apply to a trial of petitioner. Courts cannot decide cases on opinions of "experienced penal authorities and responsible professional groups" as to what the facts will be shown to be.

> "Whether delay in completing a prosecution * * * amounts to an unconstitutional deprivation of rights depends upon the circumstances. * * * The delay must not be purposeful or oppressive." *Pollard v. United States*, 352 U. S. 354, 360; 1 L. Ed. 393, 399; 77 S. Ct. 481, 486.
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> "* * * the (petitioner's) claim of possible prejudice in defending (himself) is insubstantial, speculative and premature. (He) mention(s) no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared. * * * In this respect, it should be recalled that the problem of delay is the (prosecution's) too, for it still carries the burden of proving the charges beyond a reasonable doubt." (Paraphrasing ours.) *United States v. Ewell*, 383 U. S. 116, 122; 15 L. Ed. 2d 627, 632; 86 S. Ct. 773, 779.

Petitioner also contends that the delay defeats "any

possibility of concurrent sentences." (p. 6, Petitioner's Brief.)

A similar contention was made in this court in *United States v. Ewell*, supra, based on an attempted retrial of defendents after serving substantial time in prison on a sentence later found to be void. This court disposed of that contention holding that "This, too, is a premature concern." and that "there is every reason to expect the sentencing judge to take the invalid incarcerations into account in fashioning new sentences if the appellees are again convicted." Texas law requires the sentence to run concurrently with a Federal sentence being served at the time of state sentence in the absence of a specific order of cumulation.

Ex parte Lawson, 98 Tex. Cr. R. 944; 266 SW 1101. The undersigned counsel respectfully represents to this court that cumulation is seldom done by the courts in Harris County, Texas. So we see that ordinarily if the petitioner were tried and convicted, and his punishment assessed at confinement for less time than remains on his Federal sentence (apparently about five more years) he would be discharged from his state sentence at the termination of his Federal sentence. In any event the contention that his trial now would defeat his chances for "concurrent sentences" was by this court held in *Ewell*, supra, to be "a premature concern."

In *Johnson v. Massachusetts*, 390 U. S. ——; 20 L. Ed. 2d 69; 88 S. Ct. 1155 (decided April 1, 1968) this court dismissed as improvidently granted a writ of certiorari because the record was "insufficient to permit decision" of constitutional claims of involuntariness of a confession used in a murder case resulting

in the death penalty. The record in that case of facts already developed was much more extensive than in the case at bar, and the issue there was not "premature." In the case at bar the petitioner alleges what the facts will be shown to be in the future, and is therefore less sufficient than in *Johnson v. Massachusetts*, supra. Of course the facts in *Johnson v. Massachusetts*, supra, could be developed later by the *habeas corpus* or other post conviction procedure, and could be developed in the case at bar by proceedings in the state court. Thus, petitioners here and in *Johnson v. Massachusetts*, supra, will each have ultimate judicial determination of their constitutional claims upon adequate records developed in the trial courts. The writ of certiorari herein should be dismissed.

VI

Facts Should Be Developed In State Court

In *Pollard v. United States*, supra, this court held that whether delay amounts to denial of constitutional rights "depends upon the circumstances." And in *United States v. Ewell*, supra, claims by the prisoner that the delay would result in "possible prejudice" was held to be "insubstantial, speculative and premature." A trial now in state court with appellate review (if conviction results), together with post-conviction relief in federal courts, could all be terminated long before petitioner's remaining portion of his federal sentence is served. The state court should be allowed to develop the facts and circumstances upon which to decide whether the delay "amounts to an unconstitutional deprivation of rights," *Pollard v. United States*, supra. Of course, if the petitioner (defendant) is acquitted in the state court the question would no longer exist.

PRAYER

WHEREFOR, respondents (Judge and District Attorney) respectfully pray that since the record herein is "insufficient to permit decision" herein, the writ of certiorari be dismissed as improvidently granted, or that the cause be remanded to the Supreme Court of Texas for proceedings therein or in the state trial court for development of the facts, or in the alternative that all relief prayed for by petitioner herein be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe S. Moss, Assistant District Attorney of Harris County, Texas, one of the attorneys for respondents, certify that a copy of the above and foregoing Brief of Respondents has been served upon Petitioner and the Solicitor General by depositing same in the United States Mail, Certified, Air Mail Postage Prepaid, addressed to each as follows:

Mr. Charles Alan Wright
Yale Law School
New Haven, Connecticut 06521

Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

this the [illegible] day of November, A. D. 1968.
